

STATEMENT OF ANNE L. WEISMANN  
CAMPAIGN FOR ACCOUNTABILITY

BEFORE THE COMMITTEE ON OVERSIGHT  
AND GOVERNMENT REFORM

“Ensuring Transparency Through the Freedom of Information Act (FOIA)”

JUNE 2, 2015

Mr. Chairman, Ranking Member Cummings, and Members of the Committee, thank you for providing me with the opportunity to testify today about barriers to accessing public documents under the Freedom of Information Act or FOIA. I am the executive director of a new non-profit, the Campaign for Accountability, which uses research, litigation, and communication to expose misconduct and malfeasance in public life. My testimony today draws from my 10 years of experience as the chief counsel of Citizens for Responsibility and Ethics in Washington and my more than 20 years of experience at the Department of Justice, which included supervision of government information litigation, most significantly under the FOIA. I have spent many years fighting for greater public access to records that show the public what our government is doing and why.

The FOIA offers the best tool we have for this purpose, but the statute as currently written presents challenges and limitations that opportunistic agencies have used to circumvent the FOIA's underlying disclosure purpose. Greater public disclosure is further hampered by the lack of any meaningful oversight within the Executive Branch, and the lack of comprehensive training for agency FOIA personnel. The government's failure to effectively manage its records, particularly electronic records such as emails, also has left agencies ill equipped to respond adequately to FOIA requests. I applaud this Committee for tackling the issue of how to improve government transparency through the FOIA under the strong leadership of Chairman Chaffetz and Ranking Member Cummings.

There are steps this Committee and Congress as a whole can take to restore the statute to its intended purpose of ensuring "an informed citizenry, vital to the functioning

of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”<sup>1</sup> First, Congress should pass the FOIA Oversight and Implementation Act of 2015, also called the FOIA Act, introduced by Reps. Darrell E. Issa and Elijah Cummings earlier this year, which enjoys rare bipartisan support and now boasts another important champion in Chairman Chaffetz.

The current situation cries out for the meaningful and robust reforms found in this legislation. In particular, agencies have used Exemption 5 of the FOIA and its protection for deliberative process material to block public access to a wealth of information that would provide insight into, and a better understanding of, some of the most controversial government policies. For example, based on the Department of Justice’s invocation of Exemption 5, the public has been denied access to opinions from the Office of Legal Counsel (OLC) on topics ranging from torture of detainees to authorized killing of Americans on foreign soil. DOJ has gone so far as to argue it has no legal obligation to make *any* of its OLC opinions public, even those that provide the Executive’s Branch’s definitive position on a matter or statutory interpretation. Exemption 5 has become the catchall on which agencies rely to withhold virtually any records they fear may result in embarrassment or unwanted attention.

The FOIA Act addresses this problem by excluding from Exemption 5 “records that embody the working law, effective policy, or the final decision of the agency.” This is a long overdue amendment that restores the FOIA’s intended purpose of preventing agencies from relying – as they do now – on a body of secret law, something that has been widely criticized across the political spectrum. I believe this provision is a game

---

<sup>1</sup> *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

changer, transforming our government from one shrouded in secrecy to a more open and transparent body consistent with our underlying democratic values.

Similarly, the FOIA Act provides that Exemption 5 cannot be used to bar public access to records or information created more than 25 years preceding a request. The government's need to protect deliberative process material that is 25 or more years old is virtually non-existent, yet Exemption 5 has been invoked for this very purpose. Most egregiously, the CIA withheld under Exemption 5 as deliberative a volume of history pertaining to the Bay of Pigs, an event that happened more than 50 years ago and about which there is little that is not publicly known. The amendment will prevent this kind of abuse, again restoring the FOIA to its original intended purpose.

In the same vein, the FOIA Act codifies a presumption of openness that agencies currently apply only as a matter of discretionary policy. President Obama began his first term with a public commitment to be the most transparent administration in modern history. Sadly, this aspiration has not been realized, even with strong FOIA policies in place authored by the president himself and former Attorney General Eric Holder. This reality illustrates just how difficult it is to reverse the trend of greater and greater government secrecy. By codifying as a statutory mandate what is today only an aspirational goal, the legislation stands a much better chance of achieving the kind of transparency President Obama first envisioned.

The FOIA Act also contains provisions that will strengthen oversight of agency compliance with the FOIA within the Executive Branch. The bill at long last gives the Office of Government Information Services (OGIS) an equal seat at the table with the Department of Justice, by establishing the Chief FOIA Officers Council co-chaired by the

director of OGIS and the director of DOJ's Office of Information Policy. As a requester, I have watched in frustration as OIP has attempted to subvert OGIS's efforts to maintain separate, independent authority. This is particularly troubling because OIP is not viewed by many in the open government community as a fair player seeking to protect the interests of both agencies and requesters. Rather, OIP has the reputation of an enabler, assisting agencies to whitewash their faults and emphasize only what the government is doing well under the FOIA. OGIS, on the other hand, has garnered a reputation as an entity committed to fairly and impartially ensuring the FOIA's implementation and has become an oasis for requesters seeking relief from arbitrary and unfair agency FOIA practices. The bill also contains much needed provisions that better ensure OGIS's independence from administration interference, particularly in OGIS's relationship with Congress.

But even with these provisions, there remains a lack of meaningful oversight of FOIA within the federal government. While OIP has assigned itself an oversight role, I have no expectation it will undertake that role robustly and impartially. OGIS has a limited staff and an already ambitious statutory charge, leaving it little to no room to undertake additional oversight responsibilities. This leaves inspectors general – a body that has demonstrated in the past an ability to effectively investigate allegations of misconduct under the FOIA. Congress should consider making explicit the FOIA oversight responsibilities of inspectors general and requiring them to report to Congress annually, or at least bi-annually, on how agencies have performed their statutory FOIA responsibilities.

Even the best FOIA policies and statutory provisions, however, cannot fully compensate for the widespread failure of agencies to properly train their FOIA personnel. With budget cuts and dwindling funds, agencies are offering fewer and fewer training opportunities to agency personnel responsible for handling FOIA requests. I spent many years on the board of the American Society of Access Professionals, including as its president, and watched agency enrollment in our FOIA training programs decrease each year, as agency training funds became virtually non-existent, to a level that suggested only a very small percentage of FOIA personnel were receiving adequate training. Some agencies have chosen to compensate by contracting out their FOIA processing functions. But far from offering a solution, this approach has caused more problems as it has resulted in non-agency personnel essentially making policy decisions on behalf of agencies as to which documents, if disclosed, would cause agency harm.

Federal agencies need to understand that FOIA matters, not just because it is a statutory command, but also because it serves a critical role in preserving and advancing our democratic ideals. I have been privileged to meet with many visiting dignitaries and government officials from emerging democracies who uniformly expressed their belief that democracy can be achieved only if the public is provided a statutorily guaranteed right and means of accessing government information. Sadly, some agencies appear to have lost sight of the importance of this right in our own governance, instead viewing their responsibilities under the FOIA as a burden and distraction from their primary missions. Their failure to allocate sufficient resources for FOIA training is, I believe, a direct result of this misguided view.

Finally, the government's failure to effectively manage its electronic records has greatly hampered agency responses to FOIA requests. Agencies simply have not moved from the paper-based environment of the 20<sup>th</sup> Century to the digital environment of the 21<sup>st</sup> Century. Although agencies are subject to an August 12, 2012 directive from the Office of Management and Budget and the National Archives and Records Administration, reinforced by the Presidential and Federal Records Act Amendments of 2014, to have in place by the end of 2016 an electronic records management system, they have not been provided any additional funds to achieve this goal, making the directive essentially an unfunded mandate.

Without effective electronic recordkeeping systems in place, agencies are unable to respond fully and adequately to FOIA requests seeking electronic records, such as emails. As a FOIA requester I have been told time and again by agencies they have no ability to search agency-wide for responsive emails and must instead rely on individual users to search whatever records they may have preserved, either electronically or in a paper format. As a result, all too often emails are simply beyond the reach of the FOIA. Yet for good government groups like mine, emails often provide the best source of information about what an agency is doing and why.

Despite the critical importance of emails to the public – and the scandals that erupt periodically when emails go missing – agencies have little to no incentive to preserve them, especially knowing it is emails that are likely to reveal an agency's most embarrassing secrets, or cast the agency in an unflattering light. Even without additional funds, Congress can mandate that agencies use the existing resources they have to ensure their full compliance with the OMB directive. Without a nudge from Congress, many

agencies are unlikely on their own to reprioritize dwindling agency funds toward implementing electronic recordkeeping systems.

The FOIA problems we in the access community are facing are nothing new. Some past administrations were overtly hostile to the FOIA, making it clear secrecy was their default. Insufficient resources and huge backlogs have plagued agencies for many years. This is not to suggest there have been no improvements. Many agencies now allow requesters to file electronically, and a growing number have adopted a more cooperative attitude toward requesters, working with them to ensure a response is made in a timely fashion. But the experience over the past few decades also has revealed the inherent limitations in the FOIA as currently written, exposing the need for the kind of FOIA reform embodied in the FOIA Act.

I thank and commend this Committee for recognizing its vital role in these efforts, demonstrated by its strong, bipartisan support for FOIA reform and its oversight of agency compliance with the FOIA. I look forward to working with the Committee in my new capacity with the Campaign for Accountability to secure passage of this bill and am happy to answer any questions you may have.